

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB -5 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

DAVID RANDALL JENKINS,	)	2 CA-IC 2009-0016
	)	DEPARTMENT A
Petitioner Employee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
THE INDUSTRIAL COMMISSION OF	)	Appellate Procedure
ARIZONA,	)	
	)	
Respondent,	)	
	)	
NORTHERN PIPELINE CONSTRUCTION	)	
COMPANY, a Nevada corporation,	)	
	)	
Respondent Employer,	)	
	)	
AMERICAN ZURICH INSURANCE	)	
COMPANY, an Illinois corporation,	)	
	)	
Respondent Insurer.	)	
	)	

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20080-510070

Insurer Claim No. 2080181274

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

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David Randall Jenkins

Tucson  
In Propria Persona

The Industrial Commission of Arizona  
By Andrew F. Wade

Phoenix  
Attorney for Respondent

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H O W A R D, Chief Judge.

¶1 In this statutory special action, petitioner David Randall Jenkins challenges the decision of the administrative law judge (ALJ) that Rule R20-5-118(A), Ariz. Admin. Code, is unambiguous and that the respondent insurer, American Zurich Insurance Company, substantially complied with the rule. He further asserts that the ALJ erred by not determining which party had the burden of proof and by not addressing the standard required to rebut a presumption of bad faith. For the reasons that follow, we affirm.

### **Facts and Procedural Background**

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's findings. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). While employed by the respondent employer, Northern Pipeline Construction Company, Jenkins was injured in a work-related accident on February 5, 2008. He received treatment for his injury, and the doctor decided on February 11, 2009, that his condition had stabilized. Consequently, on April 27, 2009, the insurer notified Jenkins that it was retroactively transitioning him from temporary to permanent benefits effective March 7, 2009. The insurer issued an amended notice on June 10, 2009, revising the transition date to March 27, 2009. The first payment of permanent benefits to Jenkins was made on April 27, 2009.

### Ambiguity of Administrative Rule

¶3 Jenkins first argues that the clause in Rule R20-5-118(A), Ariz. Admin. Code, allowing an insurer to retroactively change a worker's benefits is ambiguous. We review the interpretation of an administrative rule de novo. *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 18, 132 P.3d 1187, 1192 (2006).

¶4 Jenkins contends the rule is ambiguous because the retroactivity clause is not mandatory and does not address the rights of the injured worker. He reasons that this perceived ambiguity required the ALJ to construe the rule in his favor. However, in *Honeywell, Inc. v. Litchett*, 146 Ariz. 328, 332, 705 P.2d 1379, 1383 (App. 1985), we found this clause to be unambiguous. The relevant language in the version of the rule in effect when *Honeywell* was decided stated that a notice of claim status "shall not have retroactive effect for more than thirty (30) days from the date of issuance of such notice." *Id.* The clause currently states that a notice of claim status "shall not have a retroactive effect for more than 30 days from the date a carrier or self-insured employer issues" it. Rule R20-5-118(A). Although the current rule specifies the entity issuing the notice, this difference has no effect on the retroactivity itself. Jenkins has provided no authority contrary to *Honeywell*, and his argument is not persuasive. Thus, we conclude the ALJ did not err in determining that the retroactivity clause in Rule R20-5-118(A) is unambiguous.

¶5 Jenkins further asserts that the insurer did not comply in form or in substance with the requirements of Rule R20-5-118(A). In reviewing findings and awards of the ALJ, we defer to the ALJ's factual findings but independently review any

legal conclusions. *Young v. Indus. Comm’n*, 204 Ariz. 267, ¶ 14, 63 P.3d 298, 301 (App. 2003). If the decision is supported by “substantial evidence,” we will affirm. *Caganich v. Indus. Comm’n*, 108 Ariz. 580, 581, 503 P.2d 801, 802 (1972).

¶6 Jenkins first argues that the insurer failed to comply with the rule in form because it terminated his temporary disability benefits effective more than thirty days before the April 27, 2009, Notice of Claim Status, in violation of the retroactivity clause. The ALJ concluded that, although the insurer had initially miscalculated the retroactive date of the benefits change, it had later substantially corrected the error when it issued the amended notice—though she awarded Jenkins one additional day of temporary benefits. The record supports the ALJ’s finding that the insurer corrected its erroneous original notice. And, despite Jenkins’s argument to the contrary, the notices of claim status adequately informed him of his status.

¶7 Jenkins then contends that the insurer did not comply with Rule R20-5-118(A) in substance because it failed to pay all benefits accrued when it sent the April 27, 2009, Notice of Claim Status and because it did not pay his first two months of permanent disability benefits at that time. Focusing on the timing of the payments, Jenkins claims the ALJ’s decision is “completely insensitive to cash-flow timing.” As part of this argument, he provides several figures and formulas to demonstrate that he was undercompensated for his injury at particular points in time. Jenkins first asserts that he should have received temporary benefits through April 26, 2009. He then argues that, even if the benefits could be retroactively changed, he should have received all unpaid

benefits, including the first two months of permanent benefits, at the time of the April 27 notice.

¶8 The ALJ found that, because the insurer had properly invoked the retroactivity clause, Jenkins was not entitled to temporary benefits through April 27, 2009. The ALJ further concluded that Jenkins’s permanent benefits were paid in a timely manner because the insurer is required to pay permanent benefits monthly and had made the first payment “just within the thirty day deadline.” She added that nothing in the applicable statute required the insurer to make the first two payments of permanent benefits at the same time.

¶9 Jenkins’s arguments concerning the timing of the payments are unsupported by authority. And, even if some portion of the payment was not made when allegedly due according to Jenkins, the record shows the benefits were ultimately paid. Because the ALJ’s findings are supported by substantial evidence, we accept them. *See Caganich*, 108 Ariz. at 581, 503 P.2d at 802. Finally, because Jenkins’s argument regarding the amount of the benefits due is predicated on an alleged error of law, and we have concluded the ALJ did not err, we need not address the accuracy of his calculations.

### **Burden of Proof**

¶10 Jenkins next contends the ALJ erred by not considering his “request to determine which party had the burden of proof.” We review the ALJ’s legal conclusions de novo. *Young*, 204 Ariz. 267, ¶ 14, 63 P.3d at 301. Though Jenkins argues the ALJ erred by not considering his request, the ALJ in fact clearly stated that the “[c]laimant has the burden of proof to establish all of the material elements of the claim.” Moreover, her

conclusion is supported by considerable case law. *See, e.g., Russell v. Indus. Comm’n*, 104 Ariz. 548, 554, 456 P.2d 918, 924 (1969), *overruled on other grounds by Parsons v. Bekins Freight*, 108 Ariz. 130, 493 P.2d 913 (1972); *Keovorabouth v. Indus. Comm’n*, 222 Ariz. 378, ¶ 7, 214 P.3d 1019, 1021 (App. 2009). Jenkins’s position that the burden of proof should have been shifted, on the other hand, is not supported by any relevant case law. Thus, the ALJ did not err.

### **Bad Faith Presumption**

¶11 Jenkins finally argues the ALJ erred by “not considering [his] request to determine the standard of proof required to rebut the bad faith presumption.” The ALJ’s legal conclusions are reviewed de novo. *Young*, 204 Ariz. 267, ¶ 14, 63 P.3d at 301. The ALJ’s decision does not address any bad faith presumptions, however, and Jenkins has not provided us with any citations to other decisions in the record that may. Consequently, we cannot vacate the award on this ground. *See* A.R.S. § 23-951(A) (court reviews award, order, or decision).

### **Conclusion**

¶12 In light of the foregoing, we affirm the ALJ’s decision.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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VIRGINIA C. KELLY, Judge